

**United States Department of Labor
Employees' Compensation Appeals Board**

K.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Milan, IL, Employer**

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**Docket No. 06-1386
Issued: October 25, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 17, 2006 denying her request for further merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The most recent merit decision of the Office is a March 4, 2005 decision denying appellant's claim for a schedule award. Because more than one year elapsed between the last merit decision of the Office and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a)

FACTUAL HISTORY

On June 20, 2001 appellant, then a 45-year-old automation postal clerk, filed an occupational disease claim alleging that she sustained ulnar nerve entrapment at the elbows in

the performance of duty.¹ Appellant accepted a limited-duty position on July 12, 2001. On July 16, 2001 the Office accepted her claim for bilateral ulnar nerve entrapment. On August 28, 2001 the Office expanded the claim to include surgical cubital tunnel releases.² Appellant received appropriate compensation benefits.³

On April 2, 2003 appellant filed a Form CA- 7 claim for a schedule award.

In support of her claim for a schedule award, appellant submitted an April 1, 2003 report from her treating physician, Dr. Robert W. Milas, a Board-certified neurologist and neurological surgeon. He noted appellant's history of injury which included pain in the elbows and wrists for three to four years. Dr. Milas conducted an examination and noted that a neurological examination revealed cranial nerves II to XII to be intact. He advised that appellant's strength examination revealed mild weakness of the intrinsic muscles of both hands which appeared to be symmetrical. Dr. Milas noted that she was post surgical decompression bilaterally for ulnar nerve entrapment. He referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and opined that appellant had a 25 percent impairment of each upper extremity for ulnar nerve dysfunction above the level of the mid-forearm, which represented to a 30 percent impairment of the whole person. Dr. Milas filled out a separate questionnaire on April 15, 2003 and opined that appellant reached maximum medical improvement on January 20, 2002.

On April 25, 2003 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Arthur Searle, Board-certified in physical medicine and rehabilitation.

In a report dated May 27, 2003, Dr. Searle described appellant's history of injury and treatment. He noted that she did not have pain that significantly interfered with vocational and personal activity. Dr. Searle advised that appellant had normal sensation, elbow range of motion and strength and no impairment of the upper extremities.

In a July 7, 2003 report, the Office medical adviser determined that appellant had no impairment to either upper extremity.

By decision dated July 10, 2003, the Office found that appellant was not entitled to a schedule award as she did not have any impairment as a result of her work-related condition.

On August 6, 2003 appellant requested a hearing. In a January 29, 2004 decision, an Office hearing representative determined a conflict of medical opinion. Dr. Milas, an attending

¹ The record reflects that appellant had a nonwork-related condition of bilateral wrist tendinitis.

² Appellant underwent the right ulnar nerve decompression at the left of the elbow on September 7, 2001. She underwent the same procedure for the left side on October 5, 2001. Appellant was eventually released to gradual full duty on December 18, 2001. On June 25, 2002 she accepted a modified mail processor position.

³ By decision dated August 28, 2002, the Office found that appellant was reemployed as a modified mail processor for the employing establishment with actual wages of \$801.52 per week, effective June 29, 2002. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity.

Board-certified neurological surgeon and neurologist, opined that appellant had a 25 percent impairment to each upper extremity and the second opinion physician, Dr. Searle, Board-certified in physical medicine and rehabilitation, who opined that appellant did not have any impairment.⁴

On March 17, 2004 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. David Beck, a Board-certified neurological surgeon, for an impartial medical evaluation⁵

In an April 7, 2004 report, Dr. Beck reviewed appellant's history of injury and treatment and conducted a physical examination. He noted that she had full range of motion of her elbows and normal strength. Dr. Beck also indicated that appellant's diagnostic tests were normal. He referred to Table 16-11 and 15-10⁶ and noted that she had a 10 percent bilateral impairment of her upper extremities. He opined that this translated into a 2.5 percent deficit in each extremity or a total body impairment of 5 percent pursuant to Table 16-15.⁷

In a May 20, 2004 report, the Office medical adviser opined that Dr. Beck had incorrectly applied the A.M.A., *Guides*. He utilized Dr. Beck's findings and concluded that appellant did not have any impairment to her upper extremities.

By decision dated May 25, 2004, the Office found that appellant was not entitled to a schedule award as she had not sustained a compensable impairment as a result of her accepted employment injury.

On June 23, 2004 appellant requested a hearing, which was held on December 10, 2004.

In a December 29, 2004 report, Dr. Robert J. Chesser, Board-certified in pain medicine and physical medicine and rehabilitation, conducted an electromyography (EMG) scan and concluded that appellant's examination was normal. In a January 5, 2005 report, Dr. Milas stated that "electrodiagnostic studies were really quite unremarkable. With that in mind no further measures were recommended."

By letter dated January 6, 2005, the Office requested that Dr. Milas provide an impairment rating utilizing the A.M.A., *Guides*.

In a January 31, 2005 report, Dr. Milas noted appellant's history of injury and treatment and diagnosed bilateral nerve dysfunction at the elbows. He conducted an examination and indicated that he did not believe an operative approach was warranted. Dr. Milas referred to Table 16-15⁸ and determined that appellant had a combined motor and sensory deficit to each

⁴ The specific nature of the conflict dealt with whether appellant had muscle weakness.

⁵ Appellant was originally referred to Dr. Eugene Collins. However, he was associated with Dr. Milas and a new examination was scheduled.

⁶ A.M.A., *Guides* 484, 411.

⁷ *Id.* at 492.

⁸ *Id.*

upper extremity of 15 percent which would amount to a 30 percent impairment of the whole person. He referred to Table 16-3⁹ and noted that this would translate to an 18 percent impairment of the whole person.

By decision dated March 4, 2005, the Office hearing representative affirmed the Office's May 25, 2004 decision. He specifically noted that Dr. Milas "did not provide an impairment rating."

Appellant subsequently requested reconsideration in a letter received by the Office on March 8, 2006.¹⁰ She contended that she continued to experience residuals of her work-related injury and described those limits on her daily activities. Appellant also alleged that the Office hearing representative was incorrect in stating that Dr. Milas did not provide an impairment rating. She noted that Dr. Milas provided a rating and utilized the A.M.A., *Guides*. Appellant submitted updated restrictions from Dr. Milas in July 2005. She also provided a copy of her December 11, 2001 functional capacity examination.

By decision dated March 17, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions, nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,¹¹ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- (ii) Advances a relevant legal argument not previously considered by the Office; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”¹²

⁹ *Id.* at 439.

¹⁰ The Office determined that appellant's request was timely.

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹³

ANALYSIS

Appellant disagreed with the March 4, 2005 decision of the hearing representative who affirmed the Office's determination that she was not entitled to a schedule award. The underlying issue on reconsideration was whether she was entitled to a schedule award.

In her March 8, 2006 request for reconsideration, appellant submitted additional evidence and argument. She contended that not all of the evidence received by the Office prior to the March 4, 2005 decision was considered by the Office hearing representative's decision. The Office hearing representative indicated that Dr. Milas did not provide an impairment rating. Appellant noted that Dr. Milas provided a rating and utilized the A.M.A., *Guides*. The Board notes that the Office hearing representative found that Dr. Milas "did not provide an impairment rating." However, the record establishes that, on February 7, 2005, the Office received Dr. Milas' January 31, 2005 report. He addressed appellant's impairment and provided a rating utilizing the A.M.A., *Guides*. In the March 21, 2006 decision, the Office did not acknowledge receipt of the January 31, 2005.¹⁴ Appellant's legal argument is that the Office hearing representative did not consider all the evidence submitted in support of her claim for a schedule award.¹⁵ It is crucial that all evidence relevant to the subject matter which was properly submitted by appellant prior to the time of issuance of the final decision be addressed by the Office.¹⁶ Because, the Office did not consider evidence properly submitted prior to the March 4, 2005 decision, the Board finds that appellant, on reconsideration, has submitted a relevant legal argument not previously considered by the Office. Consequently, she satisfies the second criterion noted above for reopening a claim for merit review. Accordingly, the case will be remanded for a proper review of the evidence and an appropriate final decision.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ See 20 C.F.R. § 501.2(c).

¹⁵ See 20 C.F.R. § 501.6(c).

¹⁶ See *William A. Couch*, 41 ECAB 548, 553 (1990).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2006 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: October 25, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board